No. 48805-1-II

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

CHRISTINE RICHARDSON,

Respondent,

v.

GOVERNMENT EMPLOYEES INSURANCE COMPANY,

Petitioner.

BRIEF OF APPELLANT

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I. INTRODUCTION

The Trial Court has improperly attempted to create new law, overruling 100 + years of case law, by ordering discovery of information protected by the attorney client privilege, work product doctrine, and information generated post litigation. Specifically, the Trial Court has allowed the Respondent, Richardson, to inquire into post-litigation issues like litigation strategy, litigation tactics, and settlement strategy. The Trial Court has permitted discovery regarding how Appellant, GEICO, evaluates each piece of new evidence produced or discovered in litigation.

There is no Washington Authority to support the Trial Court's position that Richardson is entitled to these post-litigation materials. This ruling cannot stand and is an obvious and probable error, significantly harming GEICO in its ability to defend itself in this lawsuit. The Trial Court and Respondent's reliance on *Cedell*, is entirely misplaced regarding post-litigation materials, and contrary to Washington law.

II. GEICO'S ASSIGNMENTS OF ERROR

A. The Trial Court erred as a matter of law when it relied upon *Cedell* in this underinsured motorist case, contrary to the holding in *Cedell*.

B. The Trial Court erred as a matter of law because it found materials protected under the attorney client privilege and created post-litigation (i.e., after August 19, 2013), to be discoverable.

C. The Trial Court erred as a matter of law because it found materials created post-litigation (i.e., after August 19, 2013), consisting of materials protected by the work product doctrine, to be discoverable.

Issues Pertaining to Assignments of Error:

1. Whether *Cedell v. Farmers* applies in this case given that the holding specifically carves out an exception for UIM cases? (Assignment of Error A).

2. Whether Washington Authority allows for the fundamental right of the attorney client privilege to be removed, and allows discovery into post-litigation issues like litigation strategy, litigation tactics, and settlement strategy, once litigation has commenced? (Assignment of Error B).

3. Whether the removal of the attorney client privilege prevents GEICO from defending itself in the instant lawsuit? (Assignment of Error B).

4. Whether Washington Authority allows for discovery into post-litigation issues like litigation strategy, litigation tactics, and settlement strategy, once litigation has commenced? (Assignment of Error C).

5. Whether the Trial Court's order goes against public policy, by allowing Respondent to discover post-litigation issues like litigation strategy, litigation tactics, and settlement strategy, which cannot form the basis of Respondent's claims. (Assignment of Error C).

III. STATEMENT OF CASE

A. Factual History

Ms. Richardson was involved in a motor vehicle accident on February 11, 2010. CP 4 & 17. The tortfeasor, USAA Driver Ms. Heather Guillory, was determined to be at fault, and tendered her policy limits (i.e., $25,000.00) to Ms. Richardson. CP 499-500 & 545. Ms.

Richardson filed claims for PIP and UIM benefits under her policy of insurance with GEICO. Ms. Richardson submitted to a PIP IME on July 7, 2010 with Dr. Kendrick. CP 452-464. Following the PIP IME, a dispute over the value of Ms. Richardson's claim for PIP benefits arose, and the matter was arbitrated. CP 465; 469-470; 471; 472-475; 476-477; 478. Ms. Richardson was represented by her current counsel, Dalynne Singleton, and GEICO was represented by attorney, Sharon Dear. CP 479-493; CP 495-497. On October 8, 2011, the arbitrator found all treatment to be reasonable and necessary, and awarded Ms. Richardson amounts up to the policy limits (i.e., $35,000.00). CP 466-467. GEICO timely paid the amounts due and owing under the policy; the limits were exhausted on April 9, 2012. CP 431.

Thereafter, a dispute over the value of Ms. Richardson's claim for UIM benefits arose. CP 504-505. GEICO evaluated Ms. Richardson's claim, and determined Ms. Richardson had been fully compensated with the underlying settlement totaling $60,000 (i.e., $25,000 from the underlying tortfeasor's policy limits & $35,000 from Ms. Richardson's PIP policy limits, including waiver of the PIP subrogation). CP 504. On July 24, 2013, Ms. Richardson filed an IFCA notice, advising that she was threatening to sue GEICO. Thereafter, Ms. Richardson filed suit on August 19, 2013. CP 1-2; 2-15.

B. Procedural History

1. Background Relating to Court's Erroneous Orders Allowing Plaintiff to Invade the Post-Litigation Privilege

Since the commencement of the instant lawsuit, GEICO has responded to extensive discovery requests (i.e., at least 135 interrogatories and at least 81 requests for production), CP 202-268; 269-278, submitted to a 30(b)(6) deposition, CP 279, and produced both PIP and UIM claims files in their entirety.[1]

a. Court's Prior Orders re Cedell

Judge Laurie, of the Kitsap County Superior Court, has already made the following findings with respect to *Cedell v. Farmers Ins. Co. of Washington*, 176 Wn. 2d 686, 295 P.3d 239 (2013), in this matter.

- The July 16, 2014 order, set forth "the Court has determined that all documents are to be disclosed, subject to protective order, with the exception of a redaction of lines 5-7 and line 9 in Bates number 763." CP 86-88.
- The August 5, 2014 order found "the attorney was not engaged in claims adjustment work." CP 106-109.
- The September 12, 2014 order found that the waived attorney-client privilege is limited to the documents submitted for *in camera* review, including those generated after August 19, 2013. However, the privilege is not waived as to documents generated

1 Pursuant to *Cedell*, the parties submitted briefing regarding the withheld materials and the Court conducted an *in camera* review of the disputed materials.

after August 19, 2013 but not submitted for *in camera* review. CP 127-129.

b. Motion for Protective Order and Motion to Compel

On November 25, 2015, GEICO filed a Motion to Quash and for Protective Order, seeking to Quash the Subpoena and Notice of Deposition to attorney Sharon Dear, protecting GEICO from having to further respond to discovery and protecting GEICO from Respondent recalling its 30(b)(6) deposition. CP 130-288. On December 2, 2015, GEICO timely responded to Plaintiff's motion to compel. CP 289-324. On December 3, 2015, GEICO timely replied to its Motion to Quash and for Protective Order. CP 354-362. At the Court's request, on December 28, 2016, GEICO filed additional briefing regarding the Motion to Quash and for Protective Order. CP 370-380. On January 11, 2016, the Court Ordered the litigation file of Sharon Dear to be produced for in camera review, and that the parties meet and confer with respect to the discovery. CP 386-387. Thereafter, the parties met and conferred and GEICO further supplemented its responses. CP 897-900; 901. Respondent indicated she intended to move to renew her motion to compel. CP 902. GEICO renewed its motion for protective order. CP 872-893; 894-933. On February 22, 2016, the Trial Court issued its order allowing Respondent to invade GEICO's post-litigation privilege. CP 956-958.

2. Court's Erroneous Ruling Allowing Discovery Which Invades the Post Litigation Privilege (i.e., after August 19, 2013).

Despite the Court's prior orders that no additional materials after August 19, 2013, need be produced and that no waiver has occurred, Judge Forbes has now found that Plaintiff can invade GEICO's post-litigation privilege by allowing as follows:

> **ORDERED** that Plaintiff may pursue discovery involving activities occurring after August 19, 2013 to present. The Plaintiff's access to this discovery is limited as follows[3]:
>
> 1. The responsive discovery must involve one or more employees of GEICO. There is no discovery authorized which *solely* involves the activities of Defense Counsel.
> 2. The responsive discovery must relate to one or more of the following:
>
> a. An evaluation and/or investigation of Plaintiff's claim to the extent new information is being considered.
>
> b. Consideration of a strategy to prolong litigation or increase costs of litigation to Plaintiff.
>
> c. The refusal to settle the case.
>
> ...
>
> [3] This limitation is only as to discovery which might be otherwise considered "privileged." The Court has previously ruled that post August 19, 2013 activities are not per se privileged. Anything not covered by work-product and/or attorney client privilege should be disclosed in accordance with the rules of discovery.

CP 956-958.

This invasion into GEICO's post litigation privileges allows, for example, the discovery of GEICO's litigation strategies, settlement strategies, motion strategies, surveillance strategies, and deposition strategies. No Washington case has allowed for the invasion into these privileges. The Trial Court's Order should be overturned and the status quo of Washington law affirmed.

IV. ARGUMENT

A. Standard of Review

A privilege's existence is a question of law. *Wood v. Battle Ground Sch. Dist.*, 107 Wn. App. 550, 568, 27 P.3d 1208 (2001) (citing *Corbally v. Kennewick Sch. Dist.*, 94 Wn. App. 736, 742, 973 P.2d 1074 (1999)). Questions of law are reviewed de novo. *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 441, 191 P.3d 879, 885-86 (2008) citing *City of Tacoma v. William Rogers Co.*, 148 Wn.2d 169, 181, 60 P.3d 79 (2002). As such, a trial court's determination of whether a privilege applies should be reviewed de novo. *See Jane Doe v. Corp. of President of Church of Jesus Christ of Latter-Day Saints*, 122 Wn. App. 556, 563, 90 P.3d 1147 (2004) (citing *State v. Wood*, 45 Wn. App. 299, 311, 725 P.2d 435 (1986)), petition for review filed (Wash. Aug. 20, 2004) (No. 75870-1). A court necessarily abuses its discretion if its decision is based upon an erroneous view of the law. *See Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

Similarly, whether GEICO's privileges of work product and attorney client apply, in the instant matter, is also a question of law and reviewed de novo on appeal.

B. *Cedell* Does Not Apply in UIM Cases

The Trial Court and Richardson improperly rely upon *Cedell* for the argument that post-litigation information is discoverable.

Cedell has specifically carved out an exception to its holding by declaring that it would not apply to UIM cases because of the adversarial nature of the claims. *Cedell v. Farmers Ins. Co. of Wash.*, 176 Wn.2d 686, 697, 295 P.3d 239, 245 (2013) (relying on *Barry v. USAA*, holding in the UIM context, the insurance company is entitled to counsel's advice in strategizing the same defenses that the tortfeasor could have asserted.) As such, the Trial Court's application of *Cedell*, in the instant matter, was in error.

The Court in *Barry*, stated "[w]e have good reason to treat first-party bad faith claims involving the processing of UIM claims differently." *Barry v. USAA*, 98 Wn. App. 199, 204-05, 989 P.2d 1172, 1176 (1999). The UIM carrier stands in the shoes of the underinsured motorist/tortfeasor to the extent of the carrier's policy limits. *Dayton v. Farmers Ins. Group,* 124 Wn.2d 277, 281, 876 P.2d 896 (1994). Consequently, in UIM litigation, the carrier defending is entitled to pursue all the defenses against the UIM claimant that could have been asserted by the tortfeasor. *Id.*

Because the provision of UIM coverage is by nature adversarial, an inevitable conflict exists between the UIM carrier and the UIM insured. *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 249, 961 P.2d 350 (1998). The friction between this adversarial relationship and the traditional fiduciary relationship of an insured and an insurer is difficult to resolve. *Barry v. USAA*, 98 Wn. App. 199, 205, 989 P.2d 1172, 1176 (1999). The *Cedell*

Court, in reliance on *Barry*, excepted from its holding UIM claims. In the instant matter, the Trial Court's reliance on *Cedell*, was misplaced.

The US District Court for the Western District of Washington, in *Schreib v. American Family*, has also considered this issue. As in the instant matter, the *Schreib* case involved an uncontested liability automobile collision, wherein the Plaintiff, Ms. Schreib, alleged she suffered several injuries as a result of the collision. American Family investigated the claim and determined that Ms. Schreib had already been fully compensated by the settlement with the tortfeasor's insurance company and American Family's waiver of its PIP subrogation claim. The Court in *Schreib v. American Family* considered *Cedell*, and found:

> *Cedell*'s presumption that there is no attorney client privilege in bad faith insurance actions does not apply in the context of first party UIM claims. *See Cedell*, 295 P.3d at 247 ("[I]n first party UIM claims, there is no presumption of waiver by the insurer of the attorney-client privilege . . . .") Rather, to obtain privileged documents in a case involving a first party UIM claim, an insured must show that the insurer's bad faith in denying the claim was "tantamount to civil fraud." (*Id.*) Although *Cedell* did not address the standard for showing bad faith tantamount to civil fraud, it cited the approach used in *Barry v. USAA*, 989 P.2d 1172 (Wash. Ct. App. 1999) approvingly. *Barry* makes clear that allegations of bad faith claims handling alone, even where sufficiently supported by the record to establish a prima facie case, do not rise to the level of civil fraud. *Barry,* 989 P.2d at 1176-77. Rather, something over and above a typical claim of bad faith is required. *Id.*; *see also MKB Constructors*, 2014 WL 2526901, at * 5.

Schreib v. American Family, 2:14-cv-00165-JLR, at 5:4-15. CP 907-917.

Here, Respondent's action is predicated on GEICO's assessment of her UIM claim. CP 3-15. Dkt. 1. As such, the *Cedell* presumption that the attorney client privilege is waived is entirely inapplicable. *See Cedell*, 295 P.3d at 247. Further, Respondent has failed to establish GEICO has engaged in bad faith tantamount to civil fraud. Under *Barry*, merely resting on allegations of bad faith is insufficient to pierce the attorney client privilege. *See* 989 P.2d at 1176-77. The Trial Court inappropriately relied on *Cedell* in its February 22, 2016 order, allowing Richardson to inquire into post-litigation issues like litigation strategy, litigation tactics, and settlement strategy. Materials, such as these, are by their definition, protected under the attorney client privilege and the work product doctrines. This order must be reversed.

C. Attorney Client Privilege

1. The Attorney Client Privilege is a Fundamental Right, and the Trial Court's Order Removes GEICO's Fundamental Privilege

The Trial Court's order allows the Respondent to invade the attorney client privilege through direct and indirect means, by deposing and discovering information specifically about GEICO's evaluation and strategy in the context of litigation, litigation tactics, and settlement strategy, effectively removing GEICO's fundamental right.

For example, the Order allows inquiring into GEICO's litigation counsel's opinions regarding, for example, the depositions of witnesses, expert witnesses, litigation strategy and settlement strategy. No

Washington Court has ever allowed inquiry into litigation counsel's opinions. Allowing such discovery does not encourage the purpose of the attorney-client privilege.

The purpose of the attorney-client privilege "'is to encourage free and open attorney-client communication by assuring the client that his communications will be neither directly nor indirectly disclosed to others.'" *Pappas v. Holloway*, 114 Wn.2d 198, 203, 787 P.2d 30, 34 (1990); *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 404, 706 P.2d 212 (1985) (quoting *State v. Chervenell*, 99 Wn.2d 309, 316, 662 P.2d 836 (1983)); see also *State ex rel. Sowers v. Olwell*, 64 Wn.2d 828, 394 P.2d 681, 16 A.L.R.3d 1021 (1964).

The attorney-client privilege applies to confidential communications for advice between attorney and client during the course of the attorney's professional employment and extends from written communications between attorney and client. *See Amoss v. Univ. of Wash.*, 40 Wn. App. 666, 687, 700 P.2d 350 (1985). The privilege extends to documents that contain a privileged communication. *Dietz v. John Doe*, 131 Wn.2d 835, 842, 935 P.2d 611 (1997); *Kammerer v. Western Gear Corp.*, 27 Wn. App. 512, 517-18, 618 P.2d 1330 (1980), aff'd, 96 Wn.2d 416, 635 P.2d 708 (1981). The privilege applies to corporate clients just as it does to any other client. *Upjohn Co. v. United States*, 449 U.S. 383, 389-90, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981).

The attorney-client privilege is a fundamental right, as affirmed by the US Supreme Court. The Supreme Court has stated, "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)(citing 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961)). The Court went on to reaffirm that the "privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure". *Id.* (citing *Hunt v. Blackburn,* 128 U.S. 464, 470 (1888)). The privilege of attorneys is based upon a public policy of securing to them as officers of the court the utmost freedom in their efforts to secure justice for their clients. *McNeal v. Allen*, 95 Wn.2d 265, 267, 621 P.2d 1285, 1286-87 (1980).

In the instant matter, the Trial Court's order effectively removes the fundamental right from GEICO, leaving it unable to defend itself in the instant litigation. The Order allows inquiry into post-litigation issues like litigation strategy, litigation tactics, and settlement strategy. Richardson would be entitled to inquire as to what GEICO representatives did upon receipt of legal counsel's opinions and what the representatives thought about those legal opinions.

In practical terms, the Trial Court's order, sets a precedent to allow the opposing party to seek discovery of attorney-client opinions up to and even through trial. For example, every time GEICO were to receive new information from an expert, conduct a deposition, speak to its attorneys regarding developments in the case, or even after the first day of testimony at trial, Respondent would be allowed access to this information. The Order allows Respondent to make inquiry into how that new information impacted GEICO's litigation evaluation and impacted decisions made in reliance thereon. The order effectively removes GEICO's ability to advance its litigation strategy, implement proper litigation tactics, or develop a settlement strategy, regarding Richardson's claim.

The Trial Court's order makes GEICO's current and future defense counsels possible necessary witnesses, because they participated in discovery, took and attended depositions, reviewed materials provided by Richardson in support of her claims, spoke with GEICO to discuss strategy, and made recommendations regarding the litigation. If allowed to stand, the Trial Court's Order, will allow Respondent to move to disqualify defense counsel, under RPC 3.7, in favor of conducting depositions of counsel, seeking to inquire into post-litigation issues like litigation strategy, litigation tactics, and settlement strategy, all based on actions taken by Respondent during litigation. The absurdity of the results that would flow from the Trial Court's Order must be remedied through reversal of the same.

2. *The Court's Order Substantially Limits GEICO's Ability to Defend itself in the Lawsuit*

Insurers are entitled to zealous and effective representation by their attorneys in lawsuits filed by their insureds. *Timberlake Constr. Co. v. United States Fid. & Guar. Co.*, 71 F.3d 335, at 341 (10th Cir. 1995). Jurors may not be able to properly evaluate the propriety and significance of normal litigation tactics such as depositions and other discovery techniques and the delay inherent in resolving a case through litigation. "Allowing litigation conduct to serve as evidence of bad faith would undermine an insurer's right to contest questionable claims and to defend itself against such claims." *Id.*; see also *Palmer by Diacon v. Farmers Ins. Exch.*, 261 Mont. 91, 861 P.2d 895, 914-15 (1993); *O'Donnell v. Allstate Ins. Co.*, 1999 PA Super 161, 734 A.2d 901, 908-10 (Pa. Super. Ct. 1999). It could also result in ethical dilemmas for attorneys representing insurers. *Hovet v. Allstate Ins. Co.*, 135 N.M. 397, 89 P.3d 69, 77 (2004); *Parsons v. Allstate Ins. Co.*, 165 P.3d 809, 817 (Colo. App. 2006). Further, counsel's litigation strategy and tactics in defending a claim are likely not relevant to the insurer's earlier decision regarding coverage. *Sinclair v. Zurich Am. Ins. Co.*, No. CV 14-606 WPL/KBM, 2015 U.S. Dist. LEXIS 121077, at *10 (D.N.M. Sep. 11, 2015) c*iting Timberlake Const. Co.*, 71 F.3d at 340; *Palmer*, 861 P.2d at 915; *Acuity*, 771 N.W.2d at 635.

The privilege of parties to judicial proceedings is based upon the public interest in according to all people and entities the utmost freedom of access to the courts of justice for the settlement of their private disputes.

McNeal v. Allen, 95 Wn.2d 265, 267, 621 P.2d 1285, 1287 (1980) *citing* Restatement (Second) of Torts. As a District Court in the Tenth Circuit noted, permitting allegations of litigation misconduct would have a "chilling effect on insurers, which could unfairly penalize them by inhibiting their attorneys from zealously and effectively representing their clients within the bounds permitted by law." *International Surplus Lines Ins. Co. v. University of Wyoming Research Corp.*, 850 F. Supp. 1509, 1529 (D.Wyo. 1994), aff'd, 52 F.3d 901 (10th Cir. 1995). Insurers' counsel would be placed in an untenable position if legitimate litigation conduct could be used as evidence of bad faith. Where improper litigation conduct is at issue, generally the Federal Rules of Civil Procedure provide adequate means of redress, such as motions to strike, compel discovery, secure protective orders, or impose sanctions. See *Id.* at 1528-29.

The opposing party cannot be required to put on a dress rehearsal of the trial. *Weber v. Biddle*, 72 Wn.2d 22, 29, 431 P.2d 705, 710-11 (1967) (wherein the Court found the Appellants were warranted in asking for the identity of persons who had information on material issues in the case, but nothing more). While it is proper to elicit information as to evidentiary facts as contrasted with ultimate facts, nevertheless it is improper to ask a party to state evidence upon which he intends to rely to prove any fact or facts. *Id.* Yet in the instant matter, the Trial Court's order is in direct contradiction. The Trial Court's ruling allows Respondent to delve into GEICO's litigation strategy, litigation tactics,

and settlement strategy, arguably up through the date of trial. Moreover, allowing Respondent to discover information regarding the same significantly limits GEICO's ability to further defend this matter, as the litigation and trial strategy, litigation tactics, and settlement strategy go directly to the Trial Court's order. The Trial Court's Order is contrary to Washington law.

D. GEICO's Materials and Information Protected by the Work Product Doctrine Must Remain Protected Under Washington Law

The work product doctrine protects documents and tangible things prepared in anticipation of litigation, and it protects those documents that tend to reveal an attorney's thinking almost absolutely. CR 26(b)(4); *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 742, 174 P.3d 60, 74 (2007).

In the instant matter, "once the lawsuit was filed, this matter was under the aegis of and subject to the control of the courts." *Blake v. Fed. Way Cycle Ctr.*, 40 Wn. App. 302, 312, 698 P.2d 578, 584, *reconsideration denied, review denied*, 104 Wn.2d 1005 (1985). In order for a cause of action to be actionable, the act or practice must relate to out-of-court conduct. *Guijosa v. Wal-Mart Stores*, 144 Wn.2d 907, 921, 32 P.3d 250, 257 (2001).

Because the protections outlined in CR 26(b)(4) and (5) apply only when the requested documents were prepared, acquired, or developed in anticipation of litigation, the threshold question becomes, whether the disputed materials fall into this category. *In re Det. of W.*, 171 Wn.2d 383,

405-06, 256 P.3d 302, 313 (2011). "[T]he test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." 8 Charles Alan Wright et al., Federal Practice and Procedure, § 2024, at 502 (3d ed. 2010). "The work product doctrine does not shield records created during the ordinary course of business." *Morgan v. City of Federal Way*, 166 Wn.2d 747, 754, 213 P.3d 596 (2009) (*citing Heidebrink v. Moriwaki,* 104 Wn.2d 392, 396-97, 706 P.2d 212 (1985). In close cases, the inquiry is founded on the underlying purposes of work product protections and the expectations of the relevant actors. *See Heidebrink*, 104 Wn.2d at 400-01.

In the instant matter, once suit commenced (i.e., August 19, 2013), everything created thereafter was no longer prepared in the ordinary course of business, but rather deemed privileged and protected from disclosure, as GEICO was actively defending itself in this litigation. In support of GEICO's position, the Trial Court specifically found:

> The Court now clarifies and finds that the waived attorney-client privilege is limited to the documents submitted for *in camera* review, including those generated after August 19, 2013. ***However, the privilege is not waived as to documents generated after August 19, 2013 but not submitted for in camera review.***
>
> . . .
>
> **ORDERED** that the documents generated after August 19, 2013 and submitted for *in camera* review shall be provided with a protective order no later than 30 days from receipt of this order on reconsideration. ***Documents generated after***

August 19, 2013 but not submitted for in camera review do not need to be disclosed.

CP 127-129. (emphasis added)

GEICO has been actively defending this case upon commencement of the instant lawsuit, and all actions taken by GEICO have been in response to defending this matter. Once litigation commenced, GEICO's actions were no longer being conducted in the ordinary course of business, but rather GEICO began defending itself in this litigation. As such, anything created by GEICO post suit (i.e., post-litigation after August 19, 2013) is privileged. The Trial Court's original order was correct when it stated "the privilege is **not waived** as to documents generated after August 19, 2013 but not submitted for *in camera* review... [d]ocuments generated after August 19, 2013 but not submitted for *in camera* review do not need to be disclosed." CP 127-129. (emphasis added)

The Washington Supreme Court, in *Pappas v. Holloway*, found the work product doctrine protections continue on even after litigation has ceased and/or terminated. (wherein claims for malpractice necessitated the inquiry into actions taken during the course of litigation). *Pappas v. Holloway*, 114 Wn.2d 198, 209-10, 787 P.2d 30, 37 (1990). The work product doctrine in the instant case applies and attaches to all materials GEICO created after August 19, 2013.

In *Hickman v. Taylor*, 329 U.S. 495, 91 L. Ed. 451, 67 S. Ct. 385 (1947), the United States Supreme Court recognized qualified immunity for an attorney's work product and concluded materials which fell under

the doctrine need only be produced upon a substantial showing of necessity or justification. *Hickman*, at 510. This conclusion was drawn in large part by concern over the ramifications of allowing opposing parties to search freely the files of their respective counsel:

> Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.
>
> *Hickman*, at 511.

Courts have generally relied on *Hickman* in holding the work-product doctrine continues to protect materials prepared in anticipation of litigation even after the litigation has terminated. *See Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 487 F.2d 480 (4th Cir. 1973); see also C. Wright & A. Miller, Federal Practice § 2024, at 200-01 (1970). The underlying purposes served by the work-product doctrine and articulated in *Hickman* can be preserved only if the protection attaches even after litigation has terminated. *Pappas v. Holloway*, 114 Wn.2d 198, 210, 787 P.2d 30, 37 (1990).

In this case, all information and documents generated by GEICO after the lawsuit was filed were in response to defending itself from the lawsuit. GEICO had already fully evaluated Richardson UM claim and provided Richardson with the results of the evaluation. Richardson then

sued. GEICO is permitted to vigorously defend itself from the lawsuit within the laws of Washington.

The Trial Court's Order prevents GEICO from defending itself from the lawsuit. For example, GEICO would be obligated to disclose the following information: 1) whether it was considering surveillance, 2) when and how it planned on conducting surveillance, 3) the results of the surveillance, 4) how it planned to use the surveillance to defend itself from the allegations in the Complaint.[2] The decisions and discussions regarding surveillance are all related to the defense of the lawsuit. The decisions and discussions regarding surveillance are examples of privileges that have existed in the State of Washington for over 100 years. The Trial Court's Order improperly eliminates existing law.

E. The Trial Court's Order Goes Against Public Policy, and Fails Because Conduct from Litigation Cannot Form the Basis of Respondent's Claims.

The public policy considerations behind not allowing actions taking place during litigation, to be used as evidence therein, further support reversal of the Trial Court's Order. Litigation is by its nature an adversarial process. *Suburban Janitorial Servs. v. Clarke Am.*, 72 Wn. App. 302, 310, 863 P.2d 1377, 1382 (1993). Counsel are not bound to call attention to every mistake, oversight or assumption of opposing counsel. *Id.* Litigation strategy and tactics by counsel may be seen and imputed improperly against its client by laypersons. Courts have found that jurors

2 Surveillance is a single example. For brevity sake we have not listed and argued other examples like: 1) deposition strategy, 2) settlement strategy, 3) witness strategy, 4) witness preparation, 5) motion practice strategy.

may not be able to properly evaluate the propriety and significance of normal litigation tactics such as depositions and other discovery techniques and the delay inherent in resolving a case through litigation. *Timberlake Constr. Co. v. United States Fid. & Guar. Co.*, 71 F.3d 335, at 341 (10th Cir. 1995). Moreover, there are significant policy considerations in permitting a lay jury to impute improper motives to the imposition of a legally proper defense *Nies v. Nat'l Auto. & Cas. Ins. Co.*, 199 Cal. App. at 1202.

1. Post Litigation Conduct (i.e., materials generated after August 19, 2013), Cannot form the Basis of Respondent's Claims

A violation of the IFCA is an extra-contractual claim, created by statute, similar to a claim for violation of the Washington CPA. Post-lawsuit conduct cannot give rise to a violation of the WAC governing claims handling procedures. *Guijosa v. Wal-Mart Stores*, 144 Wn.2d 907, 921, 32 P.3d 250 (2001); *Blake v. Fed. Way Cycle Ctr.*, 40 Wn. App. 302, 312 (Wash. Ct. App. 1985). Plaintiffs in Washington may not predicate CPA claims on post-litigation conduct because post-litigation conduct, "does not occur within the sphere of trade or commerce." *Id.*

The *Blake* Court stated:

> Not only do we conclude that the events occurring after the lawsuit was commenced are not "unfair" within the meaning of the Consumer Protection Act, but we also conclude that such events do not satisfy the requisite element that such acts be "within the sphere of trade or commerce." **Once the lawsuit was filed, this matter was under the aegis of and subject to the control of the courts; as such, it was a private dispute.**

Blake, 40 Wn. App. at 312 (internal citation omitted) (emphasis added).

In *Guijosa v. Wal-Mart Stores*, 144 Wn.2d 907, 921 (2001), Plaintiffs argued that the deceptiveness of witnesses testifying for Wal-Mart could have constituted an unfair or deceptive practice. The Washington Supreme Court flatly rejected this argument. The Court stated, "The act or practice must relate to out-of-court conduct. Lies during court testimony about prior events, while reprehensible, would not constitute a CPA violation." *Id.*

Pursuant to *Blake* and *Guijosa,* any event following August 19, 2013, (the date Respondent filed suit) cannot form the basis of a Plaintiff's extra contractual claims, including any claim for violation of the IFCA, CPA, or bad faith.

Federal courts in Washington have specifically analyzed whether post-litigation conduct can give rise to WAC violations and the answer is clear: it cannot. Filing a lawsuit against an insurer "effectively halts any claims settlement process." *Stegall v. Hartford Underwriters Ins. Co.*, 2009 U.S. Dist. LEXIS 2690 4:08CV3252 (W.D. Wash. 2009) at 7. The *Stegall* Court held:

> Washington courts have only applied WAC 284-30-330(2) and 284-30-360(3) in circumstances where an insurer failed to respond to a claim-related inquiry made before litigation against the insurer was initiated. ***When Plaintiffs filed this action, they effectively halted any claims settlement process and subjected themselves to the rules governing litigation.***

Id. (internal citations omitted) (Emphasis added.)

In *Stegall*, Plaintiff argued that the claims process is ongoing even after a lawsuit is filed, and that the unfair claims handling practices defined in WAC 284-30-330 apply. *Id* at 5. The court flatly rejected this argument, holding that the Federal Rules of Civil Procedure governed the litigation, not the administrative code. *Id* at 6. Specifically, the court held that the WAC does not apply to inquiries and settlement negotiations during the course of litigation. *Id* at 7.

In *Bronsink v. Allied Prop. & Cas. Ins. Co.,* 2010 U.S. Dist. LEXIS 56159 C09-751MJP (W.D. Wash. June 8, 2010), the court held that once a complaint is filed, an insurer's duty to investigate in accordance with WAC regulations, "becomes subordinate to their litigation responsibilities." *Id* at 11. In *Navigators Ins. Co. v. Nat'l Union Fire Ins. Co.,* 2013 U.S. Dist. LEXIS 109903 C12-13-MJP (W.D. Wash. Aug. 5, 2013), the court held that after suit was commenced, the insurer no longer had a duty to send written acknowledgement of pertinent communications under the WAC. *Id* at 23.

Pursuant to *Stegall*, *supra*, by filing this case, Richardson "halted any claims settlement processes and subjected [herself] to the rules governing litigation." *Stegall,* 2009 U.S. Dist. LEXIS 2690 at 7. *Stegall* contemplated application of the WAC to litigation broadly. The Court's express language is clear – there can be no WAC violations after litigation has commenced. Based on this reasoning, the Trial Court's Order goes

against public policy, by allowing discovery into protected and privileged areas such as litigation strategy, litigation tactics, settlement strategy, and materials that were generated in defense of the instant litigation.

2. The Trial Court's Order Relies on Non-Binding Authority that is Inapplicable.

The Trial Court's Order relies on out of state, non-binding authority. The Trial Court failed to consider the binding Washington authority on point, as previously set forth by GEICO, included *supra*.

For example, the Trial Court specifically cited to *White v. W. Title Ins. Co.*, 40 Cal. 3d 870, 886, 221 Cal. Rptr. 509, 517, 710 P.2d 309, 317 (1985) in its February 22, 2016 Order. In *White,* a title insurance company failed to provide known easements with the title documents and the title insurer declined to pay the claim. However, *White* has been significantly limited by *Nies v. Nat'l Auto. & Cas. Ins. Co.*, 199 Cal. App. 3d 1192, 245 Cal. Rptr. 518 (1988), and *Cal. Physicians' Serv. v. Superior Court*, 9 Cal. App. 4th 1321, 12 Cal. Rptr. 2d 95 (1992). The *Nies* Court stated

> "The [Supreme Court] decided only that the initiation of litigation was not the controlling factor in determining admissibility. The court did not decide specifically what types of postlitigation activity would or would not be relevant or admissible on the issue of bad faith, nor did it address the policy issues involved in permitting a lay jury to impute improper motives to the imposition of a legally proper defense. Thus, White is not authority for declaring that the disputed evidence in this case was relevant."
>
> *Nies v. Nat'l Auto. & Cas. Ins. Co.*, 199 Cal. App. at 1202.

Cal. Physicians' Serv. Stated

> We will follow the lead of the *Nies v. National Auto. & Casualty Ins. Co.* court. White stands for the proposition that ridiculously low statutory offers of settlement may be introduced in a bifurcated trial, after liability has been established, as bearing on the issue of bad faith of the insurance company.
>
> *Cal. Physicians' Serv. v. Superior Court*, 9 Cal. App. 4th at 1329-30.

The Trial Court is unable to establish how the facts of the instant case are even remotely similar to the *White* case. As set forth above, *White* involved a title insurer who declined to pay a claim based on loss in value attributable to loss of groundwater. The instant matter involves a claim for UIM benefits, wherein GEICO properly evaluated the claim, and determined Ms. Richardson had been fully compensated with the $60,000 received (i.e., $25,000 from the underlying tortfeasor's policy limits & $35,000 from Ms. Richardson's PIP policy limits, including waiver of the PIP subrogation).

The relationship between a UIM insurer and its insured in Washington State "is by nature adversarial and at arm's length." *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 249, 961 P.2d 350 (1998). UIM insurance provides an excess layer of coverage that is designed to provide full compensation for all amounts that a claimant is legally entitled to where the tortfeasor is underinsured. *Allstate Ins. Co. v. Dejbod*, 63 Wn. App. 278, 281, 818 P.2d 608 (1991). "Legally entitled to" is the operative phrase, as a UIM insurer "stands in the shoes" of the tortfeasor, and its liability to the insured is identical to the underinsured tortfeasor's, up to

the UIM policy limits. *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 281, 876 P.2d 896 (1994); *see also Dejbod*, 63 Wn. App. at 281-82. Stated otherwise, UIM insurers are allowed to assert liability defenses available to the tortfeasor because UIM insurance is designed to

> place the insured in the same position as if the tortfeasor carried liability insurance. . . . The injured party is not entitled to be put in a better position by having been struck by an uninsured motorist as opposed to an insured motorist.
>
> *Dayton*, 124 Wn.2d at 281.

The Trial Court's reliance on the same is inapplicable to the instant matter. The *White* case is not binding here, and is in no way related to the instant lawsuit.

Another case that the Trial Court cited in its February 22, 2016 Order, was *T.D.S. Inc. v. Shelby Mutual Insurance Company*, 760 F.2d 1520 (11th Cir. 1985), which involved an arson fire, wherein the court affirmed a district court's refusal to sever a tort claim and a breach of contract claim brought by an insured against the insurer. The *T.D.S.* court noted that if the tort claim was predicated upon success on the breach of contract claim it might have been an abuse of discretion not to sever. *Id.* at 1534. Again, the facts in the instant case are in no way alike those in *T.D.S.,* wherein the instant matter involves a claim for UIM benefits, once GEICO had fully evaluated and made a determination on the claim.

The next case the Trial Court relied upon in its February 22, 2016 Order, *Gregory v. Continental Ins. Co.*, 575 So. 2d 534 (Miss. 1990) is inapposite. That case dealt with an insurer's duty to promptly pay

legitimate claims. *Id.* Therein the insurer recognized a sum in some amount was owed under the business interruption portion of the policy, wherein there was damage to the property. The insurer was waiting for written documentation of the loss. *Gregory v. Cont'l Ins. Co.*, 575 So. 2d 534, 541 (Miss. 1990). *Gregory* in no way deals with personal injuries or valuation of the same. Again, the instant case is distinguishable, because Ms. Richardson was making a claim for UIM benefits, which GEICO fully evaluated and determined she had been fully compensated.

The Trial Court next relied on *Babai v. Allstate Ins. Co.*, 2015 U.S. Dist. LEXIS 54152, *1 (W.D. Wash. Apr. 24, 2015), which is again similarly misplaced. In *Babai*, the case involved a water damage claim under a homeowner's policy of insurance. *Id.* at *1. Following an investigation of the claim, Allstate denied the claim. Id. at *2. The Court in *Babai*, set forth there was "no basis to assume that Allstate's ongoing contractual obligation to Plaintiff terminated after the initial coverage determination." *Id.* at *12. Rather, the Court determined counsel's emails and letters to the adjuster cannot be fairly characterized as "in anticipation of litigation." The Court likened the correspondence to an investigation of Plaintiff's claim, so that Allstate could make an informed final coverage determination. The instant case is entirely distinguishable from *Babai*. GEICO accepted coverage, and evaluated the UIM claim. GEICO determined Ms. Richardson had been fully compensated. Further, the

ruling in *Babai* is also contrary to the longstanding laws of Washington cited above.

Lastly, *Palmer by Diacon v. Farmers Ins. Exch.*, 861 P.2d 895 (Mont. 1993) supports GEICO's position. An attorney in litigation is ethically bound to represent the client zealously within the framework provided by statutes and the Rules of Civil Procedure. *Palmer by Diacon v. Farmers Ins. Exch.*, 261 Mont. 91, 121, 861 P.2d 895 (1993). These procedural rules define clear boundaries of litigation conduct. *Id.* If a defense attorney exceeds the boundaries, the judge can strike the answer and enter judgment for the plaintiff, enter summary judgment for the plaintiff, or impose sanctions on the attorney. *Id.* There is no need to penalize insurers when their attorneys represent them zealously within the bounds of litigation conduct. *Id.* To allow a jury to find that an insurer acted in bad faith by zealously defending itself is to impose such a penalty. *Id.*

The most serious policy consideration in allowing evidence of the insurer's post-filing conduct is that it punishes insurers for pursuing legitimate lines of defense and obstructs their right to contest coverage of dubious claims. *Palmer by Diacon v. Farmers Ins. Exch.*, 261 Mont. 91, 122, 861 P.2d 895, 914 (1993). If defending a questionable claim were actionable as bad faith, it would impair the insurer's right to a zealous defense and even its right of access to the courts. *Id.*

The *Palmer* Court further opined that if the insured must rely on evidence of the insurer's post-filing conduct to prove bad faith in denial of coverage, questions arise as to the validity of the insured's initial claim of bad faith. *Palmer by Diacon v. Farmers Ins. Exch.*, 261 Mont. 91, 123, 861 P.2d 895, 915 (1993). One court has gone so far as to hold that "once litigation has commenced, the actions taken in its defense are not, in our view, probative of whether defendant in bad faith denied the contractual lawsuit." *Id.* citing *Palmer v. Ted Stevens Honda*, 238 Cal. Rptr. 363, 368 (1987). In the instant matter, the Trial Court found that coverage was never denied, as a matter of law. CP 965-967.

The cases cited by the Trial Court are not on point regarding the post-litigation privilege in Washington. This order must be reversed.

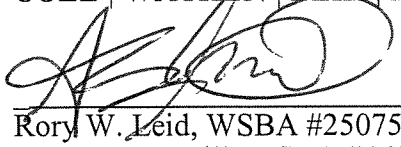
V. CONCLUSION

The Trial Court's Order should be reversed. The Court of Appeals should grant GEICO's motion for protective order to preclude the discovery of post litigation information and materials.

DATED this 26th day of September, 2016.

Respectfully Submitted,

COLE | WATHEN | LEID | HALL, P.C.



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No. 48805-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

CHRISTINE RICHARDSON,

Respondent,

vs.

GOVERNMENT EMPLOYEES INSURANCE COMPANY,

Petitioner.

PROOF OF SERVICE OF BRIEF OF APPELLANT

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I, Jan Sherred, the undersigned, hereby certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct.

1. I am over the age of eighteen (18) years and not a party to the above-referenced action.

2. I hereby certify that I caused to be filed on September 26, 2016, a Brief of Appellant a copy of the aforementioned document was also served on:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 26th day of September, 2016, at Seattle, Washington.

Jan Sherred, Legal Assistant
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COLE WATHEN LEID HALL

September 26, 2016 - 2:02 PM

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